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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION

Petitioner

vs.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICI CURIAE BRIEF OF THE STATE OF ARKANSAS AND CITY OF LITTLE ROCK IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES THE COMMUNICATIONS ACT, 47 U.S.C. §309, VIOLATE PROCEDURAL DUE PROCESS WHEN, ON THE ONE HAND, THE STATUTE REQUIRES THE FEDERAL COMMUNICATIONS COMMISSION TO ADJUDICATE THE GRANT OR DENIAL OF LICENSES ON THE BASIS OF WHETHER THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY WILL BE SERVED, AND ON THE OTHER HAND, THE STATUTE ALLOWS THE FEDERAL COMMUNICATIONS COMMISSION TO RETAIN PROCEEDS FROM AUCTIONS OF THE LICENSES IN A FUND FOR THE SALARIES AND EXPENSES OF THE COMMISSION?

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INTERESTS OF AMICI CURIAE

This Amici Curiae Brief is filed pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States. The State of Arkansas and the City of Little Rock, who are Amici Curiae in the present case, have interests that are both substantial and different than the interests of the petitioner, Advanced Communications Corporation ("ACC"). ACC has a private, economic interest in the outcome of this case. The amici, however, have state and local interests in the guarantee of educational broadcasting on direct broadcast satellite ("DBS") systems, the development of high technology employment and an improved business climate in Arkansas, and the fair exercise of federal power by an agency with regulatory authority

affecting the State's and City's interests. The Amici's interests as applied to this proceeding weigh in favor of granting the petition.

I.

STATE INTERESTS ARE JEOPARDIZED.

On or about October 16, 1995, the Federal Communications Commission ("FCC") affirmed its International Bureau's finding that ACC was not entitled to an extension of time in which to construct, launch, and operate its DBS system. The FCC's decision effectively denied ACC a permit to use a broadcast spectrum, a permit ACC initially acquired in December 1984. Prior to the FCC's denial of ACC's extension to use a DBS spectrum, ACC had committed itself to dedicating part of the spectrum to educational programming. In addition ACC's operations were to be based in Arkansas and would create high technology jobs and a business climate that would spawn related economic growth in the State. Consequently, in addition to terminating ACC's right to use a DBS broadcast spectrum, the FCC's decision jeopardizes important state and local interests in both educational broadcasting and economic development.

A. EDUCATIONAL BROADCASTING IS A STATE INTEREST.

The State of Arkansas and the City of Little Rock have a strong interest in educational broadcasting. "Society has a compelling interest in having all children educated in order that they may become good citizens." 68 Am. Jur. 2d *Schools* §5 (1993) (footnote omitted). Although the Court has not explicitly recognized that education is a fundamental right, at least one commentator has made the case that education is a fundamental right under either the Equal Protection Clause or the Due Process Clause of the United States Constitution. *See*

Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 Willamette L. Rev. 279 (1993).

In addition, state and local governments, as opposed to the federal government, have "primary responsibility for the maintenance and operation of public schools." 68 Am. Jur. 2d *Schools* §5 (footnotes omitted). The Court's statement regarding education from the landmark desegregation case of *Brown v. Board of Education*, 347 U.S. 483 (1954), remains true today: "education is perhaps the most important function of state and local governments." *Id.* at 493.[1] Congress has similarly recognized that state and local governments have primary responsibility for the education of children. The Public Broadcasting Act of 1967, for example, provides that except for purposes of insuring equal opportunity employment, nothing in the Act shall be deemed "to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over . . . the curriculum, program of instruction, or personnel of any educational institution, [or] school system. . . ." 47 U.S.C. §398(a) (1994).

Moreover, television programming is an integral part of education. Congress recognized this proposition when it enacted the Public Broadcasting Act of 1967 and created the National Endowment for Children's Educational Television.

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[1]That function will most certainly be expanded under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (popularly known as the Welfare Reform Bill). The linchpin of any program to move those on welfare to the workplace will be basic education and retraining. DBS technology promises an avenue to reach people in their homes or other least-cost locations with personalized programming to enhance the prospects for success in the workplace. State and local governments need these efficiencies to meet the cost-burden of th is looming responsibility.

The purpose of the National Endowment is "to enhance the education of children through the creation and production of television programming specifically directed toward the development of fundamental intellectual skills." 47 U.S.C. §394(a)(1994).[2] State and local governments, as opposed to the federal government, have accordingly taken an active role in educational programming. Passage of the Public Broadcasting Act "acted as a catalyst for state regulatory activity in the field of educational broadcasting." Robert Paul Sadowski, *An Analysis of Statutory Laws Governing Commercial and Educational Broadcasting in the Fifty States*, at p. 59 (1973). Most states have enacted, amended, or updated statutes on educational broadcasting, and some have even created state agencies dedicated to the development of educational broadcasting. *Id.* at 60. Thus, state and local governments have a strong interest in educational broadcasting.

Here, ACC made a commitment to dedicate part of the broadcasting on its DBS system to educational programming.[3] ACC pledged to donate two transponders on its satellite to the Foundation for Educational Advancement of Today ("FEAT"), which in turn agreed to provide free DBS receivers

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[2]The FCC recently recognized that television is integral to children's education, stating that "[i]t is difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and rely upon it for so much of the information they receive." *Policies and Rules Concerning Children's Television Programming*, FCC 96-335 (released Aug. 8, 1996) at ¶ 154.

[3]While 47 U.S.C. §335 (b)(1) (1994) requires a set aside of 4%-7% of programming for noncommercial educational or informational programming by DBS permittees, this set-aside requirement was deemed unconstitutional at the time the FCC terminated ACC's permit. *See Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 8-9 (D.D.C. 1993), *reversed, Time Warner Entertainment Co., L.D. v. Federal Communications Commission*, 93 F.3d 957, 977 (D.C. Cir. 1996).

to schools and libraries across the nation. ACC promised to donate fifteen million dollars ($15,000,000) to FEAT in support of efforts to develop educational networks.[4] The Arkansas General Assembly has appropriated grant funds to FEAT for the purpose of planning such networks. *See* 1991 Ark. Acts 691, 1993 Ark. Acts 768. Yet the FCC's denial of ACC's permit extension jeopardizes the promise that DBS telecasts will contain adequate educational programming. On this basis alone, the citizens of Arkansas and of Little Rock have an important interest in aiding ACC in obtaining a reversal of the FCC's decision.

B. ECONOMIC DEVELOPMENT IS A STATE INTEREST.

The State of Arkansas and City of Little Rock also have a strong interest in economic development. There is little question that economic development within a state is a "strong State interest." *Allstate Ins. Co. v. Stolarz*, 613 N.E.2d 936, 939 (N.Y. 1993). Since the 1930s, state and local governments have attempted to induce industry to locate facilities in their respective areas. *See generally Notes, Legal Limitations on Public Inducements to Industrial Location*, 59 Colum. L. Rev. 618 (1959). The Court has recognized that a state has an interest in fostering economic development. *See Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959) (upholding Ohio legislation that gave tax exemption to nonresidents who kept products in warehouses in Ohio for storage only). Other courts have similarly recognized a state's interest in economic development. For example, one court held that legislation giving special treatment to certain types of industrial companies bears a "rational relationship to the promotion of the general welfare, economic development, and prosperity of the

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[4]The interests of FEAT are set out in its Motion for Leave to File Brief Amici Curiae and accompanying brief in support of ACC.

state." *State of Kansas v. Kansas City*, 636 P.2d 760, 778 (Kan. 1981); *see also Barshop v. Medina County Underground Water Conservation Dist*, 925 S.W.2d 618, 634 (Tex. 1996) (upholding as constitutional an act containing a legislative finding that the act was necessary to protect "the operation of existing industries . . . and the economic development in the state"); *W. H. Greenwell, Ltd. v. Department of Land and Natural Resources*, 436 P.2d 527, 529 (Haw. 1968) (holding that a state may use "reasonable means to promote the State's interests in . . . economic development . . ." in the state).

In the present case, prior to the FCC's denial of its extension, ACC had planned to locate its DBS operations in the Little Rock metropolitan area, creating high technology employment and improving the business climate. ACC's DBS operations would have spawned related, high technology economic growth in the area. Now that ACC has been denied a permit to use a DBS broadcast spectrum, ACC no longer has any reason to expand its operations or hire new employees in Arkansas; it may have to cease its operations. The State of Arkansas and the City of Little Rock have a strong interest in supporting ACC's petition for writ of certiorari.

II.

STATE AND LOCAL GOVERNMENTS HAVE AN OBLIGATION TO PURSUE A CHECK ON FEDERAL USURPATIONS OF POWER

The State of Arkansas and the City of Little Rock have an important role in our federalist system of government to seek a check against ACC's denial of procedural due process caused by the FCC's conflict of interest. James Madison, in the Federalist No. 46, explained that both the federal government and the states derive their power from the people: "[n]otwithstanding the different mode in which they are appointed, we must consider both of them [the State Government and the

Federal Government], as substantially dependent on the great body of the citizens of the United States." *The Federalist* No. 46, at p. 315 (James Madison) (Jacob E. Cooke ed., 1961). Madison then stated that both the federal government and state governments stand in a fiduciary relationship with the people: "The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes." *Id.* One joint obligation of the states and the federal government as fiduciaries to the people is to place a check on usurpations of power by the other:

> [I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. *If their rights are invaded by either, they can make use of the other, as the instrument of redress.*

The Federalist No. 28, at p. 79 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added). The Court has used the same authority, noting that "[p]erhaps the principal benefit of the federalist system is a check on abuses of government power." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

Although the facts are fully developed in the Petition for Writ of Certiorari, a review of some facts relevant to the federal government's fiduciary obligations is necessary. In 1993 the Communications Act was amended to allocate broadcast spectrums by auction. *See* 47 U.S.C. §309(j) (1994). While ACC's petition for review of the International Bureau's decision was pending before the FCC, Congress put significant pressure on the FCC Commissioners to auction ACC's

spectrum. For example, Congress held hearings to consider the FCC's future appropriations, and the Chairman of the House Telecommunications and Finance Subcommittee, Rep. Jack Fields, criticized the FCC Commissioners for allocating licenses by lottery rather than by auction. *Reauthorization of the Federal Communications Commission: Hearing before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce,* 104th Cong., 1st Sess. at 26-27 (1995) (*cited in* Petition for Writ of Certiorari at p. 8) ("Appropriation Hearings"). In addition, at approximately the same time, the Senate voted 98-0 on an amendment to an appropriations bill to mandate the FCC to auction ACC's spectrum. *See* 141 Cong. Rec. S14513, S14513, S14515, S14574, S14586 (daily ed. Sept. 29, 1995) (*cited in* Petition for Writ of Certiorari at pp. 8-9).

Subsequently, under the authority of the Communications Act, the FCC auctioned what had previously been ACC's DBS spectrum for nearly seven hundred thirty-five million dollars ($735,000,000) to MCI Communications Corporation ("MCI") and EchoStar Satellite Corporation ("EchoStar"). *See* Petition for Writ of Certiorari at p. 11. Six days before the FCC affirmed the International Bureau's decision, the President of MCI sent a letter to FCC Chairman Hundt advising him that MCI would submit an opening bid of $175 million for the spectrum. *See* Petition for Writ of Certiorari at pp. 9-10. Chairman Hundt has repeatedly used the auctions, which have raised approximately fifteen billion dollars ($15,000,000,000), as a weapon for persuading Congress and political enemies to refrain from supporting cuts in the FCC budget. Chairman Hundt referred to the FCC as the "Federal Cash Cow" when confronted with then-Presidential candidate Steve Forbes' call for abolition of the FCC. Broadcasting & Cable, Oct. 30, 1995, at 88 (*cited in* Petition for Writ of Certiorari at p. 6). Moreover, Chairman Hundt referred to a Senate subcommittee's vote to cut the FCC's budget by 20% as a mistake that would end the FCC's spectrum auctions. *See* Stern, *Hundt Calls Budget Slash*

"Mistake", Broadcasting & Cable, Sept. 11, 1995, at 13 (*cited in* Petition for Writ of Certiorari at p. 7 n. 2). In fact, Hundt has proposed funding the FCC entirely from auction revenues. Appropriations Hearings at 14-15 (*cited in* Petition for Writ of Certiorari at p. 7). The most damning evidence, however, of the FCC Commissioners' conflict of interest is Chairman Hundt's admission in a speech after the FCC's auction of ACC's spectrum that the money bid by MCI was very influential. *See* Petition for Writ of Certiorari at p. 12.

The federal government has a fiduciary obligation to its citizens, and the inherent conflict of interest created by the FCC's power both to auction the use of broadcast spectrums and to adjudicate the grant or denial of licenses for use of broadcast spectrums creates a situation ripe for a breach of that obligation. The State of Arkansas and the City of Little Rock have a responsibility to their citizens under our federalist system of government to intervene as instruments of redress to seek a check on federal usurpations of power. This responsibility is made all the more important in the present case because the federal government's exercise of its power jeopardizes important interests of the State and City: educational broadcasting and economic development.

SUMMARY OF ARGUMENT

ACC was denied procedural due process of law when the FCC affirmed the International Bureau's refusal to extend ACC's license to use a DBS spectrum and thereafter auctioned the spectrum for seven hundred thirty-five million dollars ($735,000,000). Procedural due process entitles a litigant to an impartial adjudicator. Even the appearance of partiality may constitute a due process violation. Here, the FCC Commissioners each had a pecuniary interest in the outcome of the adjudication because the FCC budget is supplemented by revenue generated by the auctions, and Congress and the President may consider the revenues when establishing the Commissioners' compensation. During the pendency of the adjudication, the FCC was under pressure from Congress with threats of budget cuts to obtain billions of dollars from spectrum auctions. The Senate passed an amendment to an appropriations bill mandating that the FCC auction ACC's spectrum. In addition, the Commissioners received a letter prior to making their decision noting that MCI's opening bid for ACC's spectrum would be approximately one hundred seventy-five million dollars ($175,000,000). Although the Communications Act contains a provision that prohibits the FCC from considering federal revenues generated by auction of spectrums when it adjudicates matters within its purview, this provision does not cure the conflict of interest or serve to establish a cloak of neutrality.

ARGUMENT

I.

ACC WAS DENIED PROCEDURAL DUE PROCESS.

ACC was denied procedural due process when the FCC refused to extend ACC's spectrum permit because the Commissioners, who adjudicated the appeal of the denial, had a pecuniary interest in the outcome of the case. This is a different argument than the one in ACC's Petition for Writ of Certiorari.[5] ACC argues that the FCC must comply with 47 U.S.C. §309(j)(7)(A) to comport with due process. Section 309(j)(7)(A) provides that the FCC "may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding. . . ." 47 U.S.C. §309(j)(7)(A) (1994). The State of Arkansas and the City of Little Rock contend, however, that even if the FCC was disinterested, which it was not, compliance with §309(j)(7)(A) does not cure the appearance of bias. Section 309 is constitutionally infirm on its face: on the one hand, it requires the FCC to grant or deny licenses on the basis of "whether the public interest, convenience, and necessity will be served[;]" and on the other hand, it allows the FCC to retain proceeds from auctions of the licenses in a fund for the "salaries and expenses account of the Commission" as an offset to "the costs of developing and implementing the [auction] program. . . ." 47 U.S.C. §§309(a); (j)(8)(B) (1994).[6]

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[5]While the Court has said it will not ordinarily consider questions raised only by amicus curiae, *see Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 109 n.4 (1991), the Court has both considered and decided questions raised only by amici, even when undecided by the court below. *See Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion).

[6]Here, ACC sought an extension of its license to use a DBS spectrum. The FCC has recognized that extensions of time to commence service promotes "the public interest in prompt initiation of DBS service" *United States Satellite Broadcasting Co.*, 3 FCC Rcd 6858, 6861 (1988). Since then, however, Congress has given the FCC authority to auction the spectrum.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The basic requirements of due process are applicable in adjudicatory administrative proceedings as well. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975).

> This requirement of neutrality in adjudicative proceedings . . . preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done[.]'

Marshall, 446 U.S. at 242 (quoting *Joint Anti-fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).) "This stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties[.]" *Marshall*, 446 U.S. at 243 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)) (internal quotation marks omitted).

The test is whether the administrative adjudicator is in a situation "which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear, and true. . . ." *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for S. California*, 508 U.S. 602, 617-18 (1993) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)) (secondary quotation marks omitted). Adjudicators have an interest sufficient to deny due process of law if their pecuniary interest is based on a desire to generate revenues for the institution over which they have executive powers. *See Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Tumey v. Ohio*, 273 U.S. 510, 532-34 (1927). Similarly, public officials acting in a quasi-judicial capacity have an interest sufficent to offend due process if the interest is "an indirect outgrowth of a public official's desire to protect official funds." *R.L. Augustine Constr. v. Peoria School Dist.*,

904 P.2d 462, 465 (Ariz. Ct. App. 1995), *review granted*, (Oct. 24, 1995) (citing *Tumey*, at 533-34; *Ward*, at 60); *see United Church of the Medical Center v. Medical Center Comm'n*, 689 F.2d 693, 700 (7th Cir. 1982); *Meyer v. Niles Township*, 477 F. Supp. 357, 362 (N.D. Ill. 1979).

These concepts were applied in *Ward*, where this Court held that procedural due process was violated when a mayor sat as a judge in cases in which convicted petitioners paid fines to the village. An Ohio statute authorized mayors to sit as judges in cases of ordinance violations and certain traffic offenses and to fine convicted petitioners. *Id.* at 57. Although the mayor did not receive his compensation from the fines, a major part of the village's income was derived from the fines imposed by the mayor in his court. *Id.* at 58. The Court noted that "[t]his revenue was of such importance to the village that when legislation threatened its [the revenue's] loss, the village retained a management consultant for advice upon the problem." *Id.* (footnote omitted). The Court stated:

> Plainly that 'possible temptation' may . . . exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court.

Id. at 60.

The Court distinguished the facts in *Ward* from those in *Dugan v. Ohio*, 277 U.S. 61 (1928), where no due process violation was found. In *Dugan* the mayor had judicial functions but only very limited executive authority. *Id.* at 62. The city was governed by a commission of five members, including the mayor, which exercised all legislative powers. *Id.* The Court concluded that in the circumstances present in *Dugan*, the mayor's relationship to the finances and financial policy of the city was too remote to warrant a presumption of bias. *Ward*, 409 U.S. at 60-61. Thus, it is clear from the

holdings in *Ward* and *Dugan* that an adjudicator has a pecuniary interest in the outcome of cases sufficient to constitute a due process violation when the adjudicator has more than a remote relationship to the finances and financial policy of the organization.

ACC's case presents an even more compelling due process violation than that in *Ward*. Like the Mayor in *Ward*, the Commissioners appear partisan because they had an interest in achieving the high level of revenues that the federal government was to receive upon the bidding of ACC's spectrum; pressure from Congress served only to exacerbate the Commissioners' partiality. In addition, the Commissioners have broad powers and duties in relation to the objectives of the FCC, much like the mayor in *Ward* had broad duties and powers in relation to the village. *See* 47 U.S.C. §154(i) (1994).

Furthermore, in *Ward*, the funding was important to the maintenance of the village. Here, too, the funding from auctions is important to the maintenance of the FCC, whether the auctions are used as a weapon to thwart FCC budget cuts or whether the auctions are used to supplement or fully fund the FCC's budget. Moreover, the Court in *Ward* found a due process violation even in the absence of a link between the mayor's compensation and the village fund. Here, however, the level of the FCC Commissioners' compensation is arguably linked to the revenues generated by its spectrum auctions.[7]

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[7]The Commissioners' salary is set pursuant to 5 U.S.C. §§5314 and 5315. 47 U.S.C. §154(d) (1994). The provisions of 5 U.S.C. §§5314 and 5315 establish that compensation shall be based on the considerations found in 2 U.S.C. §§351 *et. seq.* 5 U.S.C. §§5314 and 5315 (1994). Under 2 U.S.C. §358, the Commissioners' compensation may be based on what is "fair and reasonable," "the prevailing market value of the services rendered in the offices and positions involved, the overall economic condition of the country, and the fiscal condition of the Federal Government." 2 U.S.C. §358(a) (1994). Thus, Congress and the President have the ability to reward the Commissioners for reaping approximately fifteen billion dollars

ACC, therefore, was denied procedural due process because the Commissioners served as adjudicators in a case in which they had an interest in generating revenues for the institution over which they have executive powers. The Commissioners had an interest in the termination of ACC's permit that was a direct outgrowth of the Commissioners' desire to enhance and protect the FCC's budget. Accordingly, the provisions of the Communications Act giving the FCC authority both to adjudicate the grant or denial of permits and to auction those same permits are constitutionally infirm. *Cf. United Church*, 689 F.2d at 699-700 (holding as unconstitutional a statute allowing a commission to adjudicate title reverter hearings in which title to property might revert to the commission); *R.L. Augustine*, 904 P.2d at 465-67 (holding as unconstitutional a statute permitting a school district board to adjudicate construction contract disputes in which the school district was a party); *cf. also Meyer*, 477 F.Supp. at 361-62 (concluding that the structure of a committee was unconstitutional where the committee was comprised of town officials with sole discretion to award medical benefits, payment of which was derived from township funds).

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[7]continued
($15,000,000,000) in spectrum auction proceeds for the federal government. In addition:

> [T]he salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such [auction] proceeds for the costs of developing and implementing the program required by this subsection.

47 U.S.C. §309(j)(8)(B) (1994). Whether or not the salaries and expenses account redounds to the direct benefit of the Commissioners, the account benefits the FCC as an organization.

II.

A CLOAK OF NEUTRALITY CANNOT BE ESTABLISHED BY A STATUTORY PROVISION.

The Respondents are likely to argue that any appearance of partiality by the Commissioners is cured by the amended Communications Act itself, which provides that the FCC "may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding. . . ." 47 U.S.C. §309(j)(7)(A) (1994). This provision, however, does not remedy the appearance of partiality.[8] A due process violation cannot be cured on the ground that a statute requires a judge to disregard the very interest which makes him or her appear partial.

In *Ward, supra,* the village asserted that an Ohio statute which provided for disqualification of interested, biased, or prejudiced judges was a sufficient safeguard to protect the rights of the petitioner. *Ward,* 409 U.S. at 61. The Court rejected this argument. In fact, the Court has rejected the proposition that procedural safeguards can protect against due process violations when judges have pecuniary interests in the outcome of cases over which they preside. *See Brown v. Vance,* 637 F.2d 272, 279 (5th Cir. 1981) (citing *Ward* and *Tumey*). The Court, consequently, has recently reiterated the proposition it stated forty years ago in *Murchison:*

> '[J]ustice,' indeed, 'must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally

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[8]Indeed, Respondents can argue only that the statute cures the *appearance* of partiality. If the Commissioners were biased, this statutory provision cannot cure the due process violation; the Commissioners will have violated the statute itself.

between contending parties.'

Concrete Pipe, 508 U.S. at 618 (quoting *Marshall*, 446 U.S. at 243). Even if the Commissioners in the present case followed the letter of the Communications Act and did their very best to be fair, justice nevertheless requires the appearance of justice. The Respondents cannot escape that FCC Commissioners played the role of adjudicators in a case in which they appeared to have a pecuniary interest. No statute can cure this appearance. Furthermore, "[e]ven appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator." *Concrete Pipe*, 508 U.S. at 618. In other words, a full review by an appelate court is not sufficient to cure a procedural due process violation. If full review by learned appellate judges is not enough, an unenforced provision in a statute certainly will not remedy the appearance of partisan adjudication.

The Amici do not contend, however, that Congress is powerless to delegate to an agency the authority to adjudicate on the basis of public benefit the grant and denial of permits to use resources under the agency's care. In addition, the Amici do not contend that Congress is powerless to enact legislation enabling an agency to conduct auctions of the resources of which the agency is a steward. The agency, however, still has a fiduciary obligation to the public with respect to allocation of the resources. With respect to broadcast licenses, Congress recognized this fiduciary obligation when it enacted §309(j)(3)(A), which provides that a spectrum must be allocated for the "benefit of the public." A fatal defect arises, however, when a statute gives an agency both the power to adjudicate whether the conditions of assignment of resources have been met and the power to auction those resources to raise revenue; those functions must in fact and law be separated to pass constitutional muster. Congress recognized the inherent conflict of interest when it enacted §309(j)(7)(A), which prohibits consideration of federal revenues in the allocation of

DBS spectrums and other frequency bands. Yet, this statutory provision cannot alleviate the FCC's appearance of partiality as an adjudicator in this case because the statute is part of a scheme that leaves the adjudicatory function in the hands of those with a participation in the fundraising function.

CONCLUSION

For over ten years, ACC complied with the rules and regulations promulgated by the FCC and invested substantial sums of money and time in developing DBS technology. At the time its spectrum license was terminated, ACC was less than a year from the scheduled launching of its DBS satellites. The market adapted over the years in reliance on the FCC's rules and regulations, and the market efficiently brought together essential commitments and players to launch the system. Among these commitments was the dedication by ACC of substantial resources to establish direct broadcasting as a vital and pervasive educational tool. The FCC, however, under pressure to reap a windfall from spectrum auctions, suddenly changed the rules and auctioned ACC's spectrum to wealthy ventures, thereby making DBS spectrums available only to entities with billions of dollars, entities which otherwise have little expertise in DBS technology. This action distorted the market's performance. Such a result is particularly curious when weighed against the congressionally mandated purpose of utilizing spectrum auctions to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public[.]" 47 U.S.C. §309(j)(3)(A) (1994). Therefore, the Amici Curiae, the State of Arkansas and the City of Little Rock, respectfully request the Court to grant the Petition for Writ of Certiorari and review the decision of the United States Court of Appeals for the District of Columbia

Circuit perfunctorily affirming the FCC's decision to terminate ACC's license to use a DBS spectrum.

Respectfully Submitted,

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